***** CAPITAL CASE *****

No. 16-8255

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT MCCOY, *Petitioner,*

v.

STATE OF LOUISIANA, *Respondent.*

ON WRIT OF CERTIORARI TO THE
LOUISIANA SUPREME COURT

REPLY BRIEF OF PETITIONER FOR CERTIORARI

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REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari to decide whether it is unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection.

A. The State of Louisiana's brief in opposition confirms that this issue is ripe for consideration in this case where it does not dispute Petitioner's account or dispute the existence of a split amongst state courts of last resorts and federal appellate courts

The State of Louisiana has not suggested that Petitioner has misstated the law or fact in his petition nor offered any objection to consideration of the question based upon what occurred in the proceedings below.[1]

The State of Louisiana does not dispute that there is a split between state courts of last resort on the federal constitutional significance of an accused's express objection to counsel conceding guilt.

The two new circuit cases relied upon by the State of Louisiana do not militate against a grant of certiorari and, in any event, address counsel's partial concession of guilt where there is a failure to consult, rather than an express objection.[2]

The petition raises a fundamental constitutional question as to which there is a split amongst lower courts and the petition contains no misstatements nor is there

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[1] Supreme Court Rule 15(2)(admonishing opposing counsel of their obligation to point out any misstatements of which they are aware in the brief in opposition).

[2] *United States v. Flores*, 739 F.3d 337, 340 (7th Cir. Ill. 2014)(Refusing to apply a presumption of prejudice on direct appeal where counsel conceded guilt on one count in the absence of evidence of whether counsel consulted with the accused, whether the accused objected or consented, or what the accused would have done if consulted); *Darden v. United States*, 708 F.3d 1225 (11th Cir. Fla. 2013)(In a case where the accused did not object when counsel conceded guilt, a failure to consult with the client before making the concession did not give rise to a presumption of prejudice).

any reason why the question presented should not be reached based upon the proceedings below.

B. The State of Louisiana's maximalist approach accords no constitutional significance to the consent or objection of the accused, envisaging a right to counsel wholly alien to that guaranteed by the Sixth Amendment

The State of Louisiana frankly and directly argues for a merits resolution of the question presented that even where counsel acts over the accused's express objection, concession of guilt is simply another strategic decision entrusted to counsel to be assessed under the existing rubric set out in *Strickland*. Of course, under *Strickland*, strategic decisions are "virtually unchallengeable". *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

The State of Louisiana is bound to take this approach in order to support the Louisiana Supreme Court's holdings that only *Strickland* applies, that there was no ineffectiveness and that the trial court was right to hold prior to trial that counsel, not the defendant, was responsible for determining the nature of any defense. A-20, 21, 24-5.

The maximalist approach advanced by the State of Louisiana accords no constitutional significance to the accused's express and timely objection to counsel conceding guilt. The State of Louisiana imagines the Counsel guaranteed by the Sixth Amendment as master, not servant, principal not agent and as a figure empowered to argue in the accused's name and bind the accused even against the accused's express objections.

This is not the counsel guaranteed by the Sixth Amendment but a far more sinister character unimagined in our constitution.

The Sixth Amendment expressly guarantees the "Assistance of Counsel for his defence".

At the time of founding "assistance" meant "help, furtherance" and "assistant" was defined as "a person engaged in an affair not as principal but as auxiliary or ministerial."[3] The words could never have been understood to have encompassed the meaning attributed to them by the State of Louisiana.

The language of the Sixth Amendment's guarantee of "the Assistance of Counsel for his defence" was chosen from New York's proposal and in preference to the language proposed by other state conventions ("be allowed counsel in his favor" and "to be heard by himself or his counsel").[4] The choice to guarantee *assistance*, rather than a right to be heard through counsel tends to confirm petitioner's interpretation and is at odds with the maximalist approach urged by the State of Louisiana. The choice of the language came against a backdrop, in both England and the colonies, of counsel serving truly as assistant not master and playing a limited,

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[3] T. Sheridan, *A Complete Dictionary of the English Language* (1796); S. Johnson, 1 Dictionary of the English Language 106 (4th ed.)(accord). This Court has previously relied upon these contemporary sources in interpreting the language of the Bill of Rights. *District of Columbia v. Heller*, 554 U.S. 570, 583-584 (2008). *See also* N. Webster, *American Dictionary of the English Language* (1828) (reprinted 1989) (defining "assistance" as "help; aid; furtherance; succor; a contribution of support in bodily strength or other means.")

[4] See George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. Ill. L. Rev. 543, 571 (2004). *See also* Laura I. Appleman, *The Community Right to Counsel*, 17 Berkeley J. Crim. L. 1, 42 (2012) ("the ability to retain and use counsel was seen less as a replacement for the defendant than as his or her assistant, traditionally utilized on the public stage of a trial. Defense counsel's main use, then, was probably to allow the jury to hear the full ramifications of the case, and not be hindered by whatever defects in presentation the defendant, on his or her own, might possess.")

rather than expansive role in the defense of criminal cases.[5] *See also Amicus Brief of Yale Ethics Bureau* (concluding that "This case demonstrates a complete breakdown in the system of representation meant to secure the fairness of American criminal justice.")

II. This Court should grant certiorari to decide whether Louisiana's rule, that a prosecutor's strike of an African American juror is irrelevant to the prosecutor's strikes of other African-American jurors if the defense simultaneously struck the same juror, violates this Court's holdings in *Foster*, *Miller-El* and *Batson* requiring consideration of all relevant circumstances.

A. The State of Louisiana's brief in opposition confirms that this issue is ripe for consideration in this case where it does not dispute Petitioner's account or argue that the question should not be reached based upon the proceedings below

The State of Louisiana has not suggested that Petitioner has misstated the law or fact in his petition nor offered any objection to consideration of the question based upon what occurred in the proceedings below.[6]

The State of Louisiana has doubled down on the decision of the Louisiana Supreme Court, boldly describing Louisiana's rule of wilful blindness as "the proper remedy for simultaneous strikes". *Brief in Opposition* at 6.

The State of Louisiana also seeks to minimize the effect of the rule, which does not merely prevent obtaining race neutral reasons for the strike but bars consideration of the suspect strike for any other purpose. At the time of writing it is

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[5] Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. Rev. 1147, 1163-9 (2010).

[6] Supreme Court Rule 15(2)(admonishing opposing counsel of their obligation to point out any misstatements of which they are aware in the brief in opposition).

a rule that extends to thirty-three of Louisiana's forty-two judicial districts. *See Amicus of LACDL* at 24.

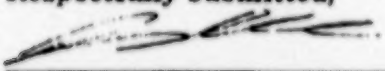
This Court should not hesitate to reaffirm the "imperative to purge racial prejudice from the administration of justice" and to "enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system". *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

Louisiana should not be permitted to confect a rule that excludes probative evidence of discriminatory intent from the *Batson* analysis, and certainly not on the basis of a simultaneous peremptory strike by the defense – a factor tending to render the State strike more, rather than less probative of discriminatory intent.

CONCLUSION

Petitioner respectfully pleads that this Court grant his writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,



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Dated: April 10, 2017